

FOR PUBLICATION

<p style="text-align: center;"><b>IN THE DISTRICT COURT OF THE VIRGIN ISLANDS</b> <b>DIVISION OF ST. CROIX</b> <b>APPELLATE DIVISION</b></p>
------------------------------------------------------------------------------------------------------------------------------------------------------

<b>O'NEALE'S HOLDING, LTD.,</b>	)	
	)	
Appellant,	)	<b>Civ. App. No. 1998-228</b>
	)	
v.	)	Re: Terr. Ct. Civ. No.
	)	627/1994
<b>JIM SOUTHERN,</b>	)	
	)	
Appellee.	)	
_____	)	

On Appeal from the Territorial Court of the Virgin Islands

Considered: April 12, 2002

Filed: May \_\_\_, 2002

**BEFORE:** **Thomas K. Moore**, Judge of the District Court of the Virgin Islands; **Stanley S. Brotman**, Senior Judge of the U.S. District Court for the District of New Jersey, sitting by designation; and **Ishmael A. Meyers**, Judge of the Territorial Court, Division of St. Thomas, sitting by designation.

**ATTORNEYS:**

**Mark L. Milligan, Esq.**  
St. Croix, U.S.V.I.  
*Attorney for Appellant,*

**George W. Cannon, Jr., Esq.**  
St. Croix, U.S.V.I.  
*Attorney for Appellee.*

## MEMORANDUM OPINION

### **Per Curiam.**

O'Neale's Holding, Ltd. ["O'Neale's" or "appellant"] appeals the trial judge's orders (1) finding that the company owes \$5,973.00 to Jim Southern ["Southern" or "appellee"] for breach of contract and (2) awarding Jim Southern \$2,812.00 in attorney's fees and costs. The contract, along with evidence presented at trial, support the trial judge's finding that O'Neale's was indebted to Southern. In addition, we find that the trial judge did not abuse her discretion in awarding attorney's fees and costs. Accordingly, this Court will affirm both orders.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

In December 1992, O'Neale's entered into a written contract with Southern through which Southern agreed to serve as project superintendent for the renovation of O'Neale's building located in Christiansted, St. Croix. Construction under the contract included "restoration and expansion of [the building], including replacement of its roof and restoration of its well, ceilings, walls, floors, arches, etc., both interior and exterior." (App.

at 175.) Under the terms of the contract, Southern was required to prepare a budget and time table for the entire project, and to advise O'Neale's "of the development of the construction project and take all steps necessary to ensure the timely completion of the building at a cost not to exceed the agreed upon budget."

(*Id.* at 176.) The contract also provided that

[a]t the Owner's expense Project Superintendent will procure and supply all materials, tools, equipment and other necessities . . . to perform the work which shall be done in a competent and workmanlike fashion. These materials procured by Project Superintendent shall be of new, good and durable quality.

(*Id.*) (emphasis added). Finally, under the contract, O'Neale's was "responsible for providing all funds for the purchase of all materials, supplies and other necessities as required for the project." (*Id.* at 177.) The contract also included an integration clause, stating that the contract could not be altered or amended except in writing signed by both parties. (*Id.* at 178.)

After Southern completed the renovations, he filed a construction lien on O'Neale's property, claiming that O'Neale's owed him money for tools he rented to O'Neale's for the project and for additional work he performed on the project under a separate oral agreement. O'Neale's sought a declaratory judgment against Southern, and requested that the Territorial Court declare the lien void on the ground that O'Neale's paid all

amounts owed. (*Id.* at 2.) In response, Southern reasserted the validity of his lien and counterclaimed for breach of contract. (*Id.* at 3-5.)

During the bench trial, Southern acknowledged that he and O'Neale's never explicitly agreed that Southern would rent his tools to O'Neale's. (*Id.* at 19, 39.) Southern stated, however, that O'Neale's was aware that he was using his personal tools on the jobsite. (*Id.* at 39, 50.) In addition, Southern's job foreman testified that the tools were constantly used on the project, and that he used them "everyday for about six months." (*Id.* at 124.)

Southern testified that O'Neale's was aware of his intent to charge for the use of his tools because he sent the appellant two invoices. The first invoice, sent to O'Neale's in May 1993, was for \$4,619.00 and covered rentals from the start of the project through May 18, 1993. (*Id.* at 181-82.) Southern testified that, after receiving the first invoice, O'Neale's informed him that it "was running a little short of money" and asked Southern to "be patient." Southern further testified that O'Neale's said that it would attempt to pay him. (*Id.* at 25.) Southern continued to use his tools on the project, and submitted a second invoice to O'Neale's in September 1993. (*Id.* at 136.) The second invoice billed O'Neales's for rentals from May 19, 1993 to September 29,

1993 and was for \$3,276.00. (*Id.* at 180.) Southern testified that O'Neale's never told him that it would not pay the invoices or to stop using his tools. (*Id.* at 136-37.)

Southern acknowledged that he did not keep daily logs specifying the precise times the tools were used and that the invoices reflected estimates, based on daily work logs, of the number of days the tools were used. (*Id.* at 19-21.) Southern testified that, in calculating the rental rates to bill O'Neale's, he charged fifty percent of what local rental companies on St. Croix charged as a daily rate for the same tools. (*Id.* at 41-43.) Southern presented the testimony of a proprietor of a local rental company who testified to the company's rental rates for the tools at issue. (*Id.* at 107-22.) Southern acknowledged that, in some instances, the amount he billed O'Neale's for renting certain tools exceeded the cost to purchase the tools new. Southern testified that he did not ask O'Neale's whether it would prefer to purchase rather than rent these tools. (*Id.* at 44-48.)

Keith O'Neale ["O'Neale"], owner of O'Neale's, countered that Southern's invoices were invalid because the contract required Southern to obtain O'Neale's authorization before renting his tools to O'Neale's. O'Neale maintained that, because Southern never obtained the company's prior consent, the

appellant was not liable for the rental fees. O'Neale acknowledged that, under the contract, his company was to pay for any tools used on the project and that there was never any understanding that Southern was to provide his own tools free of charge. (*Id.* at 57-59.)

Ken Mashburn ["Mashburn"], a construction industry expert, testified that, according to the agreement between Southern and O'Neale's, "it appeared as though [Southern] was going to act as a general contractor." (*Id.* at 90.) When asked whether a general contractor would rent his own tools to an owner, Mashburn replied that "[i]t would depend completely upon . . . how the contract is written in its inception, what the agreement was between the two parties. You can write a contract stipulating anyway you wish to do it. The process of renting tools is handled differently by every general contractor or developer." (Joint Supp. App. at 102.) Mashburn also testified that, in instances where the rental cost of a tool exceeds its purchase price, the practice in the industry is to purchase the tool. (App. at 100-01.)

Based on the contract and the evidence presented at trial, the trial judge found that the contract's language concerning Southern's authorization to procure tools was "clear and unambiguous." (*Id.* at 231.) The trial judge determined that the

contract did not (1) "prohibit Southern from procuring his own tools at O'Neale's expense" or (2) require Southern to obtain O'Neale's authorization before procuring the tools, but only that he advise O'Neale's "in a timely fashion of such needs in keeping with his project management responsibility." (*Id.*) The judge concluded, therefore, that the contract authorized Southern to rent his own tools to O'Neale's.

The trial judge found as "troublesome," however, that Southern continued to rent his tools to O'Neale's instead of purchasing the same tools once the rental costs exceeded the purchase cost. Consequently, she concluded that Southern's fees for certain tools should be reduced to their purchase price for a total reduction of \$1,922.00. (*Id.* at 232.) Because O'Neale's failed to provide evidence disputing the amount of the other rental fees charged by Southern, however, the trial judge found that Southern was entitled to damages for the invoiced amounts of those tools. Accordingly, the trial judge found that O'Neale's was indebted to Southern in the amount of \$5,973.00 for the rental of the tools. In addition, the trial judge also found that O'Neale's was indebted to Southern for \$3,500.00 for additional construction completed by Southern.<sup>1</sup>

After the bench trial, Southern's attorney moved for

---

<sup>1</sup> O'Neale's does not challenge this finding on appeal.

attorney's fees and costs. (*Id.* at 237.) Along with the motion, counsel submitted an itemized statement of his fees in the amount of \$6,412.50, and costs for \$674.50, seeking indemnification for a total of \$7,087.00. (*Id.* at 238-41.) The attorney stated that he was retained by Southern at a rate of \$150.00 an hour and that he had spent over forty hours preparing for this case, including time spent for (1) client conferences, (2) drafting pleadings and motions, (3) preparing and taking depositions, and (4) trial preparation and trial. He sought costs for, *inter alia*, witness fees and transcripts.

O'Neale's opposed the motion, arguing that counsel's request for \$7,087.00, when the total award to his client was \$9,473.00, was "excessive and unreasonable." He argued that this was a simple "collection of debt" case, and that he should not be reimbursed for conferences with his client, mediation conferences, or the time related to the trial. (*Id.* at 243-49.) The trial judge, without explanation, awarded Southern costs and attorney's fees in the amount of \$2,812.00. (*Id.* at 251.)

## **II. DISCUSSION**

### **A. Jurisdiction**

This Court has jurisdiction to review all judgments and orders arising out of the territorial court in all civil cases.



V.I. CODE ANN. tit 4, § 33 (1997 & 2001 supp.).

**B. The contract permitted Southern to bill O'Neale's for the use of his tools**

On appeal, O'Neale's avers that the trial judge erred in concluding that the contract at issue "was clear and unambiguous concerning Southern's authorization to procure tools." O'Neale's asserts that, although the contract obligated Southern to procure "tools, equipment and other necessities[,] " it did not allow him to freely spend appellant's money. O'Neale's argues that the trial judge's finding is unsupported by, and is contrary to, the evidence presented. (Blue Brief at 19-30.) Southern counters that the plain language of the contract authorized him to procure tools for the renovation project and required O'Neale's to pay for such tools. (Red Brief at 10-18.)

Contract interpretation involves mixed questions of law and fact. *Gulf Trading Corp. v. National Enter. of St. Croix, Inc.*, 912 F. Supp. 177, 179 (D.V.I. App. Div. 1996). This Court's review of the law is plenary, and we review a trial judge's findings of fact for clear error. *Id.* When considering whether a contract term is ambiguous, courts consider (1) the contract language, (2) the meanings suggested by the parties, and (3) the extrinsic evidence offered in support of each interpretation. *Bethlehem Steel Corp. v. United States*, 270 F.3d 135, 139 (3d Cir. 2001) (citing *Teamsters Indus. Employees Welfare Fund v.*

*Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132, 135 (3d Cir. 1993)).

Such extrinsic evidence may include "the structure of the contract, the bargaining history, and the conduct of the parties that reflects their understanding of the contract's meanings."

*Id.*

Here, the contract at issue specifically provided that "[a]t the Owner's expense Project Superintendent will procure and supply all materials, tools, equipment and other necessities . . . to perform the work which shall be done in a competent and workmanlike fashion." (App. at 176.) The parties do not dispute that this unambiguous provision required Southern to obtain the tools necessary to complete the renovations and O'Neale's to pay for the tools. Although O'Neale's maintains that the contract required Southern to obtain its approval before he used tools on the renovation project, the contract, on its face, expresses no such requirement. Moreover, the record indicates that O'Neale's was aware that Southern was using his own tools on the site, and became aware of Southern's intent to charge for such use upon receipt of Southern's first invoice. Finally, Mashburn testified that, according to industry standards, it was not uncommon for a general contractor, like Southern, to charge an owner for the use of his tools.

Based on a literal reading of the contract, witnesses'

testimony, and other evidence presented at trial, it was not unreasonable for the trial judge to conclude that the contract permitted Southern to bill O'Neale's for the use of his tools and that O'Neale's was obliged to pay for such use. Moreover, the record contains evidence that Southern's fees were reasonable in light of customary practice in the industry, and the judge carefully reduced them where they were not. Because the record supports the trial judge's findings, we find no error and, thus, will affirm the order finding O'Neale's liable to Southern for the use of his tools.

**C. The trial judge did not commit reversible error in calculating attorney's fees and costs**

O'Neale's maintains that the trial judge erroneously calculated lawyer's fees because she did not include specific findings explaining her calculations. Southern responds that the award of attorney's fees was properly considered and calculated.

In the Virgin Islands, "there shall be allowed to the prevailing party in the judgment such sums as the court in its discretion may fix by way of indemnity for his attorney's fees in maintaining the action or defense thereto . . . ." 5 V.I.C. § 541(b). Whether and to what extent fees should be awarded is a determination left to the trial judge's discretion. *Feddersen v. Feddersen*, 68 F. Supp. 2d 585, 598 (D.V.I. App. Div. 1999). On appeal, this Court will not disturb an award of attorney's fees

unless the trial judge abused her discretion. *Id.*

In determining what constitutes a "reasonable portion" of a party's fees and costs, a trial judge must begin with a "lodestar" amount, *i.e.*, a reasonable number of hours expended at a reasonable hourly rate. See *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-68 (3d Cir. 1973). The judge must also consider (1) the complexity and novelty of the issues presented, (2) the quality of the attorney's work, and (3) the amount of the recovery obtained. See *id.* at 168; see also *Feddersen*, 68 F. Supp. 2d at 598 (affirming where trial judge conducted the proper "lodestar" analysis and considered the requisite factors); *Jo-Ann's Launder Ctr. v. Chase Manhattan Bank*, 31 V.I. 226, 233-36 (D.V.I. 1995). Where the judge either increases or decreases the fees to adjust for the quality of work, a trial judge should set forth as specifically as possible the facts that support her conclusion. *Lindy Bros. Builders, Inc.*, 487 F.2d at 169.

Here, Southern sought indemnification for \$7,087.00 in costs and fees. (App. at 237.) There is no question that Southern was the prevailing party in this action. Southern retained his attorney at a rate of \$150.00 an hour, and counsel claimed to have spent over forty hours preparing for his client's case, for a total of \$6,412.50 in legal fees, and submitted \$674.50 in

costs. (*Id.* at 239-40.) The trial judge ultimately reduced Southern's fees and costs by some sixty percent, awarding only \$2,812.00. We agree with O'Neale's that the trial judge erred in not articulating the specific factors which led to her award of fees and costs required by *Lindy Bros.* We find, however, in light of counsel's reasonable hourly rate, the amount of time he claimed to have spent on Southern's case, and the fact that the award was only forty percent of the amount originally requested, that the trial judge did not commit reversible error.

### **III. CONCLUSION**

We conclude that the record supports the trial judge's judgment of \$5,973.00 for breach of contract in favor of Southern for the use of his tools on O'Neale's renovation project. We also find that the trial judge did not abuse her discretion in awarding Southern attorney's fees and costs in of \$2,812.00. Accordingly, this Court will affirm both orders.

FOR PUBLICATION

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST.CROIX  
APPELLATE DIVISION**

<b>O'NEALE'S HOLDING, LTD.,</b>	)	
	)	
Appellant,		<b>Civ. App. No. 1998-228</b>
	)	
v.		)Re: Terr. Ct. Civ. No.
		627/1994
<b>JIM SOUTHERN,</b>	)	
	)	
Appellee.		
	)	
	)	

---

On Appeal from the Territorial Court of the Virgin Islands

Considered: April 12, 2002  
Filed: May \_\_\_, 2002

**BEFORE:**     **Thomas K. Moore**, Judge of the District Court of the Virgin Islands; **Stanley S. Brotman**, Senior Judge of the U.S. District Court for the District of New Jersey, sitting by designation; and **Ishmael A. Meyers**, Judge of the Territorial Court, Division of St. Thomas, sitting by designation.

**ATTORNEYS:**

**Mark L. Milligan, Esq.**  
St. Croix, U.S.V.I.  
*Attorney for Appellant,*

**George W. Cannon, Jr., Esq.**  
St. Croix, U.S.V.I.  
*Attorney for Appellee.*

**ORDER**

For the reasons set forth in the accompanying memorandum of

even date, it is hereby

**ORDERED** that the Territorial Court's order finding that O'Neale's Holding, Ltd. is liable to Jim Southern in the amount of \$5,973.00 is **AFFIRMED**. It is further

**ORDERED** that the Territorial Court's order awarding Jim Southern attorney's fees and costs in the amount of \$2,812.00 is **AFFIRMED**.

**ENTERED** this \_\_\_\_ day of May, 2002.

**ATTEST:**

**WILFREDO F. MORALES**

**Clerk of the Court**

**By:**

\_\_\_\_\_  
**Deputy Clerk**

**Copies to:**

Judges of the Appellate Panel  
Hon. Raymond L. Finch  
Hon. Geoffrey W. Barnard  
Hon. Jeffrey L. Resnick  
Judges of the Territorial Court  
Mark L. Milligan, Esq., St. Croix  
George W. Cannon, Esq., St. Croix  
Mrs. Jackson  
Mrs. Francis  
Kim Bonelli  
Chris Ann Keehner, Esq.  
St. Thomas law clerks  
St. Croix law clerks